

From: Harry LeBlanc
To: Microsoft ATR
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Subject: Microsoft settlement

I am a professional software developer with 13 years experience, and have used both Microsoft and non-Microsoft operating systems, middleware, development tools, and applications. I am deeply disturbed by the proposed settlement, both for what is included and what is left out. I exhort Judge Kollar-Kotelly to remedy these flaws.

What is included:

1. A five-year limit. Given that Microsoft is riding the wave of ill-gotten profits accrued over a decade of illegal monopolistic practices, five years isn't enough to restore a marketplace of normal competition, even if the settlement didn't provide mechanisms (noted below) for Microsoft to hamper the function of the implementors of the proposed settlement. It seems to me that the enforcement period should be at least twice the duration of Microsoft's criminal past, and perhaps certain structural elements of a sound settlement should be enforced in perpetuity.
2. Microsoft's voice in the technical committee. Since when does a criminal choose its guards? Given the pervasive influence of Microsoft in the market, and their persistent monopolistic behavior, it is dubious at best that their chosen representative, and the representative who can be vetoed by that person, will fully have the interests of the public at heart. Watchdogs chosen by Microsoft, on the Microsoft payroll, and working fulltime in secrecy on the Microsoft campus, do not meet any reasonable criteria for impartiality.
3. Moreover, crafting in a feature that allows Microsoft to dispute costs gives Microsoft a handy built-in mechanism for sandbagging. I quote: "Microsoft may, on application to the Court, object to the reasonableness of any such fees or other expenses. On any such application: (a) the burden shall be on Microsoft to demonstrate unreasonableness; and (b) the TC member(s) shall be entitled to recover all costs incurred on such application (including reasonable attorneys' fees and costs), regardless of the Court's disposition of such application, unless the Court shall expressly find that the TC's opposition to the application was without substantial justification." Given the vast wealth Microsoft has illegally obtained from the public through its monopolism, setting enforcement expenses as "reasonable", and giving Microsoft a mechanism for subpoenaing their watchdogs (thus distracting them from their true duty) is asking for trouble. Microsoft's bearing of the "expenses" of such activity will be trivial, and more than compensated by the implicit protection of any future monopolistic behavior concealed from the technical committee -- not to mention that it lets Microsoft run out the clock at a very cheap cost. The technical committee should have a free hand, and an unlimited budget underwritten by Microsoft.
4. Microsoft has implicit control over who is permitted to be their competitor. Again, I quote:

"(c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business..."

Why does Microsoft get to apply the litmus test of the "authenticity and viability" of who is permitted to see their APIs?

Another quote:

"Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. "

Doesn't Microsoft have control over who participates in their proprietary MSDN program, and don't they set criteria of participation (eg, nondisclosure, etc)? This is one of the very mechanisms by which Microsoft has implemented their monopolistic strategy. Such APIs should be *freely distributed* to the *public*, not sold to the few acceptable competitors that Microsoft designates, on terms of their own setting. Allowing Microsoft to use their MSDN mechanism and decide which business is authentic and viable is too weak. It specifically gives Microsoft a mechanism to exclude open source developers, academics, etc.

What is left out:

5. Recompense. Microsoft has illegally profited for years from their monopolistic practices. That money rightfully belongs to the public, and should be returned to the public. It should be fairly straightforward to measure the average profitability of their nearest competitors vs. Microsoft's illegally enhanced profit margins, thus determining how much Microsoft illegally profited. Perhaps this money could be funneled into educational grants for computer hardware and (completely non-Microsoft) software for elementary, secondary, and college tuition. These funds should easily cover the expense of putting (for example) a Linux computer on the desktop of every student in public schools, state universities, etc.

6. Punitive damages. Over and above returning the ill-gotten gains to the public, Microsoft should be penalized for their illegal activities.

7. Document formats. Microsoft enforces its monopoly by keeping their file formats proprietary. Since Microsoft chooses which competing operating systems to support with their applications, companies who have been monopolistically pressured into buying Microsoft applications (eg, MS Office) are trapped on the Microsoft platform by their inability to migrate their (proprietary and copyrighted) corporate data to other operating systems. This is key. Microsoft applications compel users to stick with Microsoft operating systems, this perpetuating their monopoly. The only remedy would be to open up their file formats (or possibly to require them to provide fully and publicly documented import/export features that allowed users to migrate *all their data* (including "objects" such as forms, reports, etc.) to competing products, and to likewise recreate data from compliant import files (even if created by competing products). In other words, the public deserves a way to get all their data out of Microsoft products, and Microsoft should pay for providing such a mechanism.

I've heard the rationale that punishing Microsoft would be bad for the economy. First of all, that's no excuse for failing in the duty to enforce justice. Secondly, the leverage Microsoft has in the economy was acquired through their crimes, and the judgment should not perpetuate the consequences of their crimes for fear of rocking the boat. Third, monopolists have always been bad for the economy, the contrary arguments of monopolists notwithstanding. And finally, the amount of money from recompense and punitive damages, pumped back into the economy in such a way as to stimulate competition in the computer software field, should provide an enormous economic boost.

American citizens are counting on Judge Kollar-Kotelly to faithfully perform her solemn duty to uphold justice by preventing this weak and flawed proposed settlement from being implemented, and properly addressing the true interests of the United States of America by returning the ill-gotten wealth from Microsoft to the public from whom they stole it, further penalizing Microsoft financially, and crafting structural remedies to prevent Microsoft from ever being able to commit the same crimes again.

All America is counting on you, Judge. Do your duty.

Sincerely,

Harold C. LeBlanc
1300 Powderhorn Terrace
Apt. 11
Minneapolis, MN 55407-1669
(612-729-9670)
hleblanc@bitstream.net

They that can give up essential liberty
to obtain a little temporary safety,
deserve neither liberty nor safety.
--Benjamin Franklin